

IN THE NEBRASKA COURT OF APPEALS

**MEMORANDUM OPINION AND JUDGMENT ON APPEAL**

STATE V. LAWARE

NOTICE: THIS OPINION IS NOT DESIGNATED FOR PERMANENT PUBLICATION  
AND MAY NOT BE CITED EXCEPT AS PROVIDED BY NEB. CT. R. APP. P. § 2-102(E).

STATE OF NEBRASKA, APPELLANT,

V.

JASON A. LAWARE, APPELLEE.

Filed March 20, 2012. No. A-11-733.

Appeal from the District Court for Sarpy County: WILLIAM B. ZASTERA, Judge. Affirmed as modified.

Jason C. Caul, Deputy Sarpy County Attorney, for appellant.

No appearance for appellee.

INBODY, Chief Judge, and MOORE and PIRTLE, Judges.

INBODY, Chief Judge.

**INTRODUCTION**

Jason A. Laware pled guilty to motor vehicle homicide and driving under the influence causing serious bodily injury. Laware was sentenced to 15 to 20 years' imprisonment on the motor vehicle homicide conviction and 5 to 5 years' imprisonment on the driving under the influence causing serious bodily injury conviction. The sentences were ordered to be served consecutively, and Laware was given credit for 370 days served. The State has appealed Laware's sentences as excessively lenient, arguing that Laware was erroneously given credit for time served for time that he spent in the hospital receiving treatment for his injuries.

**STATEMENT OF FACTS**

On August 11, 2010, at approximately 8:30 a.m., Laware was driving a vehicle while intoxicated. His vehicle jumped a median, striking a car driven by Dr. Adam Smith head on. As a result of the injuries sustained in the accident, Dr. Smith died. Dr. Smith's two children, who

were in the back seat of the car, sustained serious injuries. Laware also sustained serious injuries and was hospitalized.

On September 9, 2011, an arrest warrant was issued for Laware, and the arrest warrant was served on September 30. Laware was charged with one count of motor vehicle homicide and two counts of driving under the influence causing serious bodily injury. After his arrest on September 30, Laware remained incarcerated, as he was unable to post bail.

In June 2011, Laware pled guilty to an amended information charging him with motor vehicle homicide, a Class III felony, and driving under the influence causing serious bodily injury, a Class IIIA felony. At the sentencing hearing held on August 15, the district court sentenced Laware to 15 to 20 years' imprisonment for the motor vehicle homicide conviction and 5 to 5 years' imprisonment on the driving under the influence causing serious bodily injury conviction. The sentences were ordered to run consecutively, Laware's motor vehicle operating privileges were revoked for 15 years, and Laware was given credit for 370 days served. Laware's credit for time served included time Laware spent in the hospital recovering from the injuries that he sustained in the accident. The court stated that the court believed that Laware was "technically" in custody prior to his arrest on September 30, 2010. The State has timely appealed Laware's sentence as excessively lenient pursuant to Neb. Rev. Stat. §§ 29-2320 and 29-2321 (Cum. Supp. 2010).

#### ASSIGNMENT OF ERROR

The State contends that the district court imposed excessively lenient sentences by granting Laware credit for time served in excess of what he actually earned while incarcerated awaiting disposition.

#### STANDARD OF REVIEW

When the State appeals and claims that a sentence imposed on a defendant is excessively lenient, the standard of review is whether the sentencing court abused its discretion in the sentence imposed. *State v. Alford*, 278 Neb. 818, 774 N.W.2d 394 (2009). If a sentence is found to be excessively lenient, the appellate court may remand the cause for imposition of a greater sentence, remand the cause for further sentencing proceedings, or impose a greater sentence. See Neb. Rev. Stat. § 29-2323 (Reissue 2008).

Whether a defendant is entitled to credit for time served is a question of law. *State v. Alford, supra*.

#### ANALYSIS

The sole issue on appeal is whether the district court abused its discretion in granting Laware credit for time served for time when he was not under arrest or incarcerated resulting in an excessively lenient sentence.

Neb. Rev. Stat. § 83-1,106(1) (Reissue 2008) provides, in part, that "[c]redit against the maximum term and any minimum term shall be given to an offender for time spent in custody as a result of the criminal charge for which a prison sentence is imposed or as a result of the conduct on which such a charge is based." The term "in custody," for the purposes of § 83-1,106(1), is defined as "judicially imposed physical confinement in a governmental facility

authorized for detention, control, or supervision of a defendant before, during, or after a trial on a criminal charge.” *State v. Jordan*, 240 Neb. 919, 923, 485 N.W.2d 198, 201 (1992).

Information contained in the record and the presentence investigation report reflects that Laware was arrested pursuant to an arrest warrant on September 30, 2010, and that he remained incarcerated up until his sentencing because he was unable to post bail. Prior to his arrest, Laware was hospitalized, recovering from injuries sustained in the crash and participating in walking rehabilitation. We agree with the State that the time Laware spent in the hospital prior to his arrest was not spent “in custody” and should not have been counted for the purposes of determining his credit for time served. Cf. *State v. Jordan*, 240 Neb. 919, 485 N.W.2d 198 (1992) (time spent under electronic monitoring conducted at defendant’s residence does not count as time spent “in custody” for purpose of sentencing credit under § 83-1,106(1)); *State v. Anderson*, 18 Neb. App. 329, 779 N.W.2d 623 (2010) (sentencing court erred in granting defendant credit against his jail sentence for time spent in alcohol treatment rehabilitation facility prior to sentencing).

### CONCLUSION

In sum, we find that Laware was erroneously given credit for periods of time when he was not “in custody” in the calculation of his credit for time served. Therefore, we affirm Laware’s sentences but modify the number of days of credit for time served to 319 days, which is the amount of time that Laware spent in custody after his arrest until his sentencing.

AFFIRMED AS MODIFIED.